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IN THE
COURT OF APPEALS OF INDIANA

Estate of WILLIAM GAREY,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 31A04-0610-CV-565
	)	
LARRY E. GESWEIN and	)	
SOUTH CAPITOL PROPERTIES, LLC,	)	
	)	
Appellees-Defendants.	)	

APPEAL FROM THE HARRISON CIRCUIT COURT
The Honorable K. Lynn Lopp, Special Judge
Cause No. 31C01-0303-PL-11

September 25, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

The Estate of William Garey ("the Estate") appeals the denial of its motion to correct error, following the trial court's determination that the Estate committed actual or constructive fraud in making a real estate contract with Larry E. Geswein and South Capitol Properties, LLC (collectively, "Geswein"). We reverse and remand.

Issue

The dispositive issue is whether the trial court clearly erred in concluding that the Estate committed actual or constructive fraud.

Facts and Procedural History

The relevant facts most favorable to the trial court's judgment indicate that William Garey died in April 1996. Garey's daughter, Diana Robinson ("Diana"), was appointed personal representative of the Estate, which owned two tracts of commercial real property in Corydon. Geswein was interested in purchasing Tract I, which included a building that Garey had used for various automotive ventures. Over the years, thousands of tires had been placed inside, outside, and on top of the building. Geswein visited the property twice, walked around the building, and noticed the tires. Geswein offered Diana $300,000 for the property, and Diana accepted.

On August 2, 2001, Geswein and Diana, as personal representative of the Estate, executed a purchase agreement. The agreement provided that Geswein would purchase the property "as-is" and would release the Estate "from any and all liability relating to any defect or deficiency affecting the real estate"; that Geswein had waived his right to require any inspections and relied on his own examination of the property; and that the Estate would

remove tires from the property. Appellant's App. at 21. On October 3, 2001, Diana signed an environmental disclosure indicating the presence of an underground storage tank on the property. Geswein signed the disclosure the next day at closing.

On October 4, 2001, the parties executed a real estate contract, pursuant to which Geswein agreed to purchase the property for $300,000. The contract provided for a down payment of $29,894, monthly installments of $3000, and an annual interest rate of 7.5 percent. The sixtieth and final installment was to be a balloon payment of $173,508.94. The contract further provided for a late payment fee of $50 plus interest and for the payment of the seller's damages in the event of default, including reasonable attorney's fees incurred in enforcing any right under the contract. Finally, the contract provided in pertinent part:

> 20. **SELLER'S LIMITED WARRANTY**: Seller represents and warrants the following:
>
> (a) Except for that certain small fuel oil tank previously used to fuel the boiler disclosed and known by the parties, there is not constructed, deposited, stored, disposed, placed or located on the above-described real estate any underground storage tank, or any material, element, compound solution, mixture, substance or other matter of any kind, including solid, liquid, or gaseous material, that (i) is a hazardous substance as defined in the Federal Comprehensive Environmental Response Compensation and Liability Act, as amended, 42 U.S.C., Section 9601 and following, the Resource Conservation and Recovery Act, as amended, 42 U.S.C., Section 6901 and following, the regulations promulgated from time to time under either of the foregoing acts, environmental laws administered by the United States Environmental Protection Agency and similar laws and regulations of the State of Indiana, County of Harrison, City of Corydon or any other governmental organization or agency, or (ii) may cause or contribute to damage to the public health or the environment; or if any of such matters do exist on the real estate, Seller shall eliminate the same at its own expense prior to conveying title to Buyer.

(b) Seller has not received within the last six (6) months written notice from any governmental agency of any violation or alleged violation of any fire, zoning, building, health or environmental laws, regulations, rulings or ordinances or of any other violations or alleged violations of law not cured.

(c) In conveying title to Buyer, Seller shall comply with the Indiana Responsible Property Transfer Law, I. C. 13-7-22.5-1 and following.

(d) The representations and warranties of Seller contained in this Section shall be true as of both the date of this contract and the date on which Seller becomes obligated to convey title to Buyer; and Seller shall defend, indemnify and hold Buyer harmless from and against any and all liabilities and obligations of every nature whatsoever, including but not limited to attorney fees and other litigation expenses, which may be incurred by Buyer as a result of the falsity of any such representations or breach of warranties of the Seller.

(e) Except as set out above, Seller makes no warranty, express or implied, relative to the conditions of the real estate and the Buyer accepts the same as it is.

(f) That Seller will:

(i) Remove all property from the premises that belong[s] to the State; however, Buyer agrees to disregard any property which remains after one (1) year.

(ii) Remove, or cause to have removed, all tires from the property within a mutually agreeable time.

….

24. **ENTIRE AGREEMENT**: All understandings and agreements heretofore made and had between the parties hereto are merged in this contract, which alone fully and completely expresses their contract, and this contract is entered into after full investigation, neither party relying upon any statement or representation, not embodied in this contract, made by the other.

Id. at 93-94.

In a memo to Diana dated December 19, 2001, Geswein made the following statements regarding his understanding of the contract's tire removal provision:

> According to the contract we signed, ALL tires are to be removed from the premises in a mutually agreeable time. I understand this to mean all tires, including any tires left in the building, inside trailers behind the building, on top of the building, on the hillside by the road behind the building, and buried on the property. Because tires left outside become breeding places for mosquitoes and as a result a health hazard, you cannot remove them too soon to be agreeable to us and the Harrison County Heath [sic] department. We cannot agree to a time table that leaves tires on the premises after the contract is paid off. This could be 2 to 5 years. I personally would be willing to give of my time to help you in any way I am able, to remove these tires.

Id. at 166.

The Estate began removing tires from the property at its expense in December 2001. At some point, Geswein found tires buried on the property. Diana offered to remove them, but Geswein refused and cordoned off the property with yellow caution tape.

In 2002, Diana discovered that the contract's legal description of the property mistakenly included Tract II, on which she operated a furniture business. Geswein's counsel drafted a corrected contract with the proper legal description, but Geswein refused to sign it. Instead, Geswein attempted to collect rent from the occupants of Tract II and threatened to evict Diana for failure to pay rent. In March 2003, the Estate sued Geswein, seeking reformation of the contract based on mutual and unilateral mistake. In May 2003, Geswein

filed an answer and a counterclaim alleging that the Estate had committed fraud by failing to disclose that tires were buried on the property.[1]

Geswein stopped making payments on the contract after July 4, 2003, because he "was afraid the property wasn't worth what [he] had already paid" the Estate. Tr. at 101. In December 2003, the Estate amended its complaint, alleging that Geswein had defaulted on the contract and requesting the appointment of a receiver and foreclosure. The trial court appointed a receiver in March 2004, after which the Estate finished removing all tires from the property. In April 2005, the trial court entered summary judgment in favor of the Estate on its reformation claim.

On November 18 and December 9, 2005, a bench trial was held on the remaining issues. The Estate filed a motion for findings of fact and conclusions thereon pursuant to Indiana Trial Rule 52(A), and the parties submitted proposed findings and conclusions. On March 9, 2006, the trial court issued an order that reads in relevant part:

FINDINGS OF FACT

….

5. It was the undisputed testimony of the parties that sometime subsequent to the parties' closing on October 4, 2001, Geswein discovered on the above-described property buried tires and other waste located thereon.

6. It is this Court's finding that it was the clear intent of the parties for Geswein to purchase property as it existed and was observable to his inspection, as to items located above ground, not below the surface.

[1] Geswein's counterclaim also alleged that "an environmental assessment of the property … indicated that petroleum had also been found therein." Appellant's App. at 26. At trial, however, Geswein acknowledged that he had found nothing buried underground other than tires, tire rims, "a large electric motor, a few pieces of scrap and maybe some pieces of rubber tire liners possibly." Tr. at 92. According to Geswein, the only indication of the presence of petroleum "might have been little slicks in the water[.]" *Id*. In sum, Geswein's fraud claim was actually litigated only as to the Estate's alleged misrepresentations regarding the buried tires. At trial, Geswein presented no evidence and admitted that he personally did not know whether the buried tires were hazardous pursuant to federal, state, or local law.

7. It was clear from the evidence presented and the testimony of the parties, to-wit: Geswein's Exhibit "A", that on the 17th day of November, 1995, the Indiana Department of Environmental Management issued a warning letter regarding the open dumping of solid waste, indicating that there was at that time an environmental hazard on the premises, which is the subject of this dispute herein. Moreover, it is clear from the cumulative Exhibit "A" presented by Geswein that Diana Robinson executed the signature card presented by the United States Post Office to acknowledge receipt of said letter of warning to Mr. William Garey, now deceased on the 27th day of November, 1995. Robinson's testimony that she executed her signature on the receipt and did not read the contents of the letter despite having submitted earlier testimony in response to Counsel [Robison's] cross-examination that she was Mr. Garey's bookkeeper and payer of his bills.
8. It is clear from the testimony of the parties and the evidence presented herein that Robinson had actual knowledge of buried waste upon the above-described property, which was buttressed by testimony elicited by Geswein's counsel from John Robinson, the husband of the Plaintiff (Executrix) herein.
9. It is the Court's observation that Robinson denied repeatedly that she had actual knowledge of the aforementioned IDEM letter despite evidence to the contrary. There [sic] is disingenuous in light of her other testimony that she was in the process of shutting down Mr. Garey's business, due to its losing money, during the time frame the IDEM letter was received. Robinson also testified as to her knowledge of other items having been buried on the premises.
10. It is the undisputed testimony of the parties that since that time the balance owed pursuant to the Contract amounts to $239,625.73; accrued interest at the rate of 7.5% amounts to $46,384.08; late fees at $50.00 per month accruing from July 4, 2003 through January 31, 2006 amount to $1,550.00; court costs of $111.00; attorney's fees accruing at $165.00 per hour for 69.15 hours amount to $11,409.75; miscellaneous other legal expenses (court reporter) amount to $563.00. Thus, the current total amount prayed for by Robinson is $299,643.56.
11. As of July 4, 2003, Geswein had paid Robinson the total of $92,894.00 pursuant to the terms of the Contract plus incurred other property related expenses (repairs).
12. Subsequent to the closing held by the parties on October 4, 2001, the Indiana Department of Environmental Management conducted a subsequent investigation of the waste located upon the above described property as evidenced and certified within Geswein's cumulative Exhibit "A".

CONCLUSIONS OF LAW

1. While the Contract referred to in the foregoing is clear on its face, it is also clear to this Court that parole evidence should be admitted based upon the equity defenses set forth by Geswein in his Answer and Counterclaim heretofore filed with this Court. While the parole evidence rule bars the admission of any evidence of any oral representations, which contradicts the written contract, it may be considered if it is not offered to vary the terms of the written contract but to show, that fraud, intentional misrepresentations or mistake entered into its formation.
2. This Court finds that the evidence presented by the parties and the testimony elicited by the witnesses showed clearly there was intentional misrepresentation and fraud committed by Robinson failed to disclose there were tires and other waste buried below the surface of the ground and not discoverable by reasonable inspection and that statements made by Robinson were material misrepresentations made with knowledge or reckless ignorance of their falsity, and which were relied upon by Geswein to his detriment.
3. It is clear to the Court from the evidence presented and the testimony of the parties that Robinson had actual knowledge of the buried tries [sic] on the property. John Robinson testified he had been married to Diana Sue Robinson for a period of time exceeding twenty (20) years and he had been inextricably involved in the affairs concerning the William Garey property. Moreover, John Robinson had an extensive employment history at the auto repair and tire business, which had been located on the premises prior to the sale of the property to Geswein. Therefore, John Robinson, who clearly filled the role as agent to Robinson had knowledge of the property's hidden defects superior to that of Geswein.
4. Thus, Robinson(s) actual knowledge of the buried tires and waste below the surface of the ground vested them with superior knowledge and position from which to make a deal with Geswein, who relied to his detriment upon their misrepresentations that the property was accurately represented by them verbally and by its outward (above-ground) appearance.
5. Robinson(s) silence on the salient fact of the buried tires and waste on the above described property amount to, in the very least, constructive fraud during the formation of the Contract.
6. It is well settled law that the party who commits the constructive or actual fraud not be allowed to benefit or profit from said fraud.
7. Therefore, this Court concludes that Robinson should take nothing by way of her Complaint, and the parties should be restored to their status quo positions existing prior to the formation of the Contract executed

by the parties on October 4, 2001. Therefore, the monies paid by Geswein in the amount of $92,894.00 should be refunded to Geswein.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court as follows:

1. That Robinson take nothing by way of her Complaint against Geswein.
2. All monies paid to the Robinsons by Geswein, in the amount of $92,894.00, prior to his unilaterally ceasing payments on July 4, 2003 shall be refunded to Geswein. This shall be deemed a Judgment bearing the statutory interest rate.

Appellant's App. at 142-46 (citations omitted).

The Estate filed a motion to correct error, which the trial court denied. This appeal ensued.

Discussion and Decision

The Estate contends that the trial court erred in concluding that it committed actual or constructive fraud. Our standard of review is well settled:

> [W]hen a trial court has entered findings of fact and conclusions of law pursuant to a party's request, we engage in a two-tiered standard of review. We must first determine whether the evidence supports the findings of fact and then whether the findings support the judgment. The court's findings and judgment will not be reversed unless clearly erroneous. Findings of fact are clearly erroneous when the record lacks any facts or reasonable inferences from the evidence to support them. The judgment is clearly erroneous when it is unsupported by the findings of fact and conclusions entered on the findings. In making these determinations, we will neither reweigh the evidence nor judge witness credibility, but we will consider only the evidence favorable to the judgment and all reasonable inferences therefrom.
>
> When, as here, the court has made special findings pursuant to a party's request under Ind. Trial Rule 52(A), this court may affirm the judgment on any legal theory supported by the findings. Before affirming on a legal theory supported by the findings but not espoused by the trial court, we should be confident that its affirmance is consistent with all of the trial court's findings of fact and the inferences drawn from the findings.

Henry v. Henry, 758 N.E.2d 991, 992-93 (Ind. Ct. App. 2001) (citations omitted). "[W]hile we defer substantially to findings of fact, we do not do so to conclusions of law. We evaluate questions of law *de novo* and owe no deference to a trial court's determination of such questions." *N. Elec. Co. v. Toma*, 819 N.E.2d 421, 422 (Ind. Ct. App. 2004) (citation omitted), *trans. denied* (2005).

The Estate makes several discrete arguments, only one of which we need address in any detail.[2] The Estate does not challenge the trial court's determination that a party to a contract who commits actual or constructive fraud during the formation of the contract may not benefit or profit from that fraud.[3] Rather, the Estate argues that Geswein failed to establish the essential elements of either actual or constructive fraud.

In *Pugh's IGA, Inc. v. Super Food Services, Inc.*, we stated,

> The elements of actual fraud are
> 1. a material misrepresentation of past or existing fact by the party to be charged which
> 2. was false,
> 3. was made with knowledge or in reckless ignorance of the falsity,
> 4. was relied upon by the complaining party, and

[2] Among other things, the Estate challenges the trial court's finding number 7 on the "warning letter" from IDEM "regarding the open dumping of solid waste, indicating that there was at that time an environmental hazard on the premises[.]" Appellant's App. at 142. The Estate points out that the letter makes no mention of tires and actually states that an IDEM staff member had inspected the site and confirmed that the open dumping violation—whatever it was—had been corrected. *Id.* at 167. As such, finding number 7 is clearly erroneous. Curiously—and correctly, as it turns out—Geswein states that the letter "is a red herring and completely irrelevant as to whether there were tires buried under the ground and not visible to anyone and about which the seller(s) had actual or [at] the very least constructive knowledge." Appellees' Br. at 10. We find this statement curious because the trial court's finding number 7 was adopted verbatim from Geswein's proposed order, as were all of the trial court's other findings and several of its conclusions. While we do not prohibit the practice of adopting a party's proposed findings, we note that "there is an inevitable erosion of the confidence of an appellate court that the [adopted] findings reflect the considered judgment of the trial court." *Prowell v. State*, 741 N.E.2d 704, 709 (Ind. 2001).

[3] The Estate does contend that foreclosure, rather than rescission, is the proper remedy in cases involving a real estate contract. Given our resolution of this issue, we need not address that contention.

5. proximately caused the complaining party injury.

The elements of constructive fraud are

1. a duty owing by the party to be charged to the complaining party due to their relationship,

2. violation of that duty by the making of deceptive material misrepresentations of past or existing facts or remaining silent when a duty to speak exists,

3. reliance thereon by the complaining party,

4. injury to the complaining party as a proximate result thereof, and

5. the gaining of an advantage by the party to be charged at the expense of the complaining party.

531 N.E.2d 1194, 1197 (Ind. Ct. App. 1988) (citations omitted), *trans. denied* (1989).

The Estate contends that Geswein failed to prove that he was injured by any material misrepresentation of fact regarding the buried tires and therefore failed to establish that the Estate committed actual or constructive fraud.[4] We agree. "To constitute actionable fraud, it must appear that the complaining party has been damaged[,] and that the damage is a proximate result of the fraud. Fraud without injury does not give rise to a cause of action." *Rhoda v. NIPSCO*, 171 Ind. App. 401, 406, 357 N.E.2d 287, 289 (1976) (citations omitted). We find it telling that the trial court did not specifically find that Geswein was injured and that Geswein offers no response to the Estate's argument on this point. At trial, Geswein offered only the following self-serving testimony as evidence that he was "severely" economically damaged by the alleged material misrepresentation regarding the buried tires:

> Well, to begin with, I lost the property and it's whatever income it was bringing. I had intended to after two years of making payments to secure a bank financing and pay the Robinson's [sic] off, but in order to do that I would have had to perpetuate what I considered the fraud they had committed or tell

[4] We note that the trial court was free to disbelieve Diana's testimony that she did not know about the buried tires prior to signing the contract. That said, we do not reach the question of whether Diana had an affirmative duty to disclose the existence of the buried tires to Geswein. Neither do we reach the question of the legal effect of Geswein's agreement to purchase the property "as-is" without an inspection.

> them to take a chance and tell them about the problems of the property and hope they disregarded it in securing financing. I did not risk that possibility so I chose not to go forward with that and instead stopped making payments.

Tr. at 103, 104.

In other words, Geswein used the tires as an excuse to stop making payments on the contract. It is undisputed that the Estate fulfilled its contractual obligation to remove *all* tires from the property; any delay in removing the buried tires was due solely to Geswein's refusal to allow the Estate to enter the property. On appeal, Geswein wisely does not argue that he was injured by any material misrepresentation regarding the buried tires or that his failure to make payments on the contract was otherwise legally justifiable. In light of the foregoing, we conclude that Geswein defaulted on the contract and that the trial court clearly erred in concluding that the Estate committed actual or constructive fraud. Therefore, we reverse and remand for a determination of the Estate's damages and remedies pursuant to the contract, including the recovery of trial and appellate attorney's fees.

Reversed and remanded.

BAKER, C. J., and FRIEDLANDER, J., concur.